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In the

Supreme Court of the United States

No. 781

VIRGIL C. MOORE,
Petitioner,

v.

MARIE E. MATHIS AND J. E. (BILL) DECKER,
SHERIFF OF DALLAS COUNTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO JURISDICTION

Petitioner never appealed the state court default judgment of June 23, 1961, in Cause No. 41754-2-A (P's Exh. 11, R. 139), nor was this or any petition for writ of certiorari filed to review that judgment. The time for filing a petition in the Supreme Court of the United States to review the default judgment expired long before the instant Petition was filed herein.

The Petition for Writ of Certiorari herein was filed January 23, 1964, to review the state court judgment of November 9, 1962, in Cause No. 72080-A, (R. 41) wherein Petitioner attacked the default judgment in No. 41754-2-A which had

been rendered sixteen months earlier (R. 26-38). After a contested trial (R. 51-77) the state trial court held against Petitioner (R. 41). On Petitioner's appeal the Court of Civil Appeals affirmed, holding that the Petitioner had failed to allege or prove the essentials of an attack on a valid judgment, viz: fraud, accident or wrongful act of the Respondent unmixed with fault or negligence of Petitioner. The Supreme Court of Texas, without comment, refused error, no reversible error (R. 409). That is the extent of the decision below. The decision did not include or involve a ruling as to due process in the trial of either Cause No. 41754-2-A, nor Cause No. 72080-A. Petitioner has never alleged that the court denied due process in the trial of Cause No. 72080-A, the instant cause.

Petitioner did not present to the Texas courts a substantial federal question, and the decisions of those courts did not expressly pass upon or decide a substantial federal question, and not even the Petition herein presents a substantial federal question, at least not one which can override the fact that Petitioner was negligent in failing to preserve it by appealing the earlier default judgment. Petitioner ignores the very points upon which the decision below was based: (1) Petitioner knew of the judgment against him in time to have prosecuted a writ of error. He filed a Motion to Set Aside on August 21, 1961 (R. 151). This was long before the six months for filing a writ of error in the state court expired. Art. 2255, V.A.C.S. (2) He was negligent in not appealing within the six months period allowed.

The decision below stands upon a simple point of long-standing state procedural law, and does not involve even an implied question of due process under the United States Constitution. Furthermore, Petitioner never pleaded in the trial court in the instant cause that he had been wrongfully deprived of a jury (R. 26-38), and even failed to raise the point in the Court of Civil Appeals, below. (R. 281-355) Therefore, that point is not before this Honorable Court.

REPLY TO STATEMENT OF THE CASE

The question of compliance with Texas Rules of Civil Procedure in granting the default judgment in Cause No. 41754-2-A is not before the Court because Petitioner failed to exercise diligence by failing to appeal from that judgment after timely notice. (See Objection to Jurisdiction, supra).

Regardless, neither of Petitioner's objections to the procedure is sound. Petitioner admits jurisdiction of the trial court. (Petition for Writ of Certiorari, pages 4 & 5.) He merely claims that the trial court in that former case made an unauthorized severance and erred in determining the damages finally and without a jury.

With regard to severance, Rules 40(b), 41 and 174(b), Texas Rules of Civil Procedure, authorize such procedure in Texas. Obvious advantages to the interest of justice through severance in the instant case were to get the severed party out of the remainder of the case, and to enable him to appeal the default prior to trial of the remainder of the case. In *Pierce v. Reynolds*, 329 S.W. 2d 76, the Supreme Court of Texas held that even if severance was erroneous,

it was still effective in the absence of objection, and in any event that such severance was not void and that a complete judgment in a severed cause is final and appealable.

Rule 240, Texas Rules of Civil Procedure (Petition for Writ of Certiorari, p. 5) was no longer applicable after the severance reduced Cause 41754-2-A to a single defendant. Besides, the Rule uses the term "may", and thus is not mandatory.

With regard to the waiver of jury trial, Petitioner did not demand a jury trial, nor object (until he reached the Supreme Court of Texas) to the fact that the trial court heard the evidence without a jury (R. 51-77, 139). Rule 220, Texas Rules of Civil Procedure, was amended in 1947 to read as follows:

> "Rule 220. Withdrawing Cause from Jury Docket.
>
> "When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket *over the objection of the parties adversely interested.* If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit." (Emphasis supplied)

Since no one objected to the withdrawal of the case from the jury docket, the Petitioner was not entitled to a trial by jury under Rule 220 or 243, Texas Rules of Civil Procedure.

Petitioner never raised the jury point in No. 41754-2-A, not even in his two Motions to set aside (R. 151-2, 156-9). Petitioner did not even raise the point in his pleadings in the trial court in the instant case (R. 26-38). Nor did the

Petitioner raise the point in the Court of Civil Appeals (R. 281-335). He therefore waived the jury point repeatedly.

The least that can be said is that the Texas Rules of Civil Procedure afford a reasonable basis for the actions of the trial court in Cause No. 41754-2-A, and such actions were not arbitrary and capricious. Due process was not denied.

As to Cause No. 72080-A, the instant suit in which the judgment was entered below, this was a contested case, and Petitioner has failed to point out any respect in which the trial court violated any due process.

CONCLUSION

Respondent prays that the Application for Writ of Certiorari be denied.

Respectfully submitted,

FRITZ AND VINSON,

By
EDWARD C. FRITZ,
505 North Ervay,
Dallas 1, Texas,
Attorney for Respondent.

CERTIFICATE OF SERVICE

I, EDWARD C. FRITZ, a member of the Bar of the Supreme Court of the United States, do hereby certify that upon the 13th day of February, 1964, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioners by depositing same in the United States Post Office or mail box with postage prepaid addressed to the following counsel of record at his post office address, to-wit:

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Edward C. Fritz
Edward C. Fritz